

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GREGORY A. HUGHES,

Plaintiff,

v.

BANK OF AMERICA, N.A., et al.,

Defendants.

3:11-cv-617-RCJ-WGC

ORDER

Currently before the Court is a motion to dismiss (#5) and motion to expunge lis pendens (#6) filed by Defendants Bank of America, N.A., PRLAP, Inc., and ReconTrust Company, N.A. (collectively "Defendants"). Because the foreclosure process was proper, Defendants' motions to dismiss (#5) and expunge lis pendens (#6) are granted.

BACKGROUND¹

Plaintiff Gregory A. Hughes is the owner of real property located at 2995 Shady Creek Court, Reno, Nevada 89523 (the "Property"). (Compl. (#1-1) at 3). To finance the purchase of the Property, Plaintiff obtained a loan from Defendant Bank of America in the amount of \$385,000.00, which was secured by a deed of trust executed on December 15, 2005 (the "Deed of Trust"). (Deed of Trust (#5-1) at 1-2). The Deed of Trust listed Bank of America as

¹ Defendants have requested judicial notice to be taken of attached copies of relevant publicly recorded documents. (See Mot. to Dismiss (#5) at 3 n.1). The Court will take judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 the lender and PRLAP as the trustee. (*Id.*).

2 At some point prior to January 27, 2010, Plaintiff defaulted on the loan. (Notice of
3 Default (#5-4)). On January 27, 2010, Bank of America substituted ReconTrust as trustee and
4 ReconTrust recorded a notice of default and election to sell under deed of trust that same day.
5 (Substitution of Trustee (#5-3); Notice of Default (#5-4)). ReconTrust later rescinded this
6 notice of default on April 30, 2010. (Rescission (#5-5)).

7 Bank of America assigned the Deed of Trust to BAC Home Loans Servicing, LP ("BAC")
8 on January 5, 2011. (Assignment (#5-6)). The same day, BAC again substituted ReconTrust
9 as trustee of the Deed of Trust and ReconTrust filed a new notice of default and election to
10 sell under deed of trust. (Substitution (#5-7); Notice of Default (#5-8)).

11 The Nevada Foreclosure Mediation Program issued a certificate permitting the
12 foreclosure to proceed on June 20, 2011. (Certificate (#5-9)). ReconTrust then recorded a
13 notice of trustee's sale on July 12, 2011 with a sale date of August 3, 2011. (Notice of Sale
14 (#5-10)). The sale was postponed and has not gone forward as of September 7, 2011. (Mot.
15 to Dismiss (#5) at 4).

16 Plaintiff filed a complaint on June 9, 2011 against Bank of America, PRLAP,
17 ReconTrust, BAC, First American Title Insurance Company, and Charlotte Olmos. (Compl.
18 (#1-1)). The complaint asserts nine causes of action, including: (1) debt collection violations
19 under NRS § 649.370; (2) unfair and deceptive trade practices under NRS § 598.0923; (3)
20 unfair lending practices under NRS § 598D.100; (4) violation of the covenant of good faith and
21 fair dealing; (5) violation of NRS § 107.080; (6) quiet title; (7) fraud in the inducement and
22 through omission; (8) slander of title; and (9) abuse of process. (Compl. (#1-2) at 28-58).
23 Plaintiff recorded a lis pendens on the Property the same day he filed his complaint. (Notice
24 of Lis Pendens (#5-11)).

25 On August 22, 2011, Defendants Bank of America (as Bank of America and as
26 successor by merger to BAC), PRLAP, and ReconTrust moved to dismiss the complaint for
27 failure to state a claim and to have the lis pendens expunged. (Mot. to Dismiss (#5); Mot. to
28 Expunge Lis Pendens (#6)).

LEGAL STANDARD

The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citations omitted).

To avoid a Rule 12(b)(6) dismissal, a complaint must plead “enough facts to state a claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). Although detailed factual allegations are not required, the factual allegations “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be accepted as true and all reasonable inferences that may be drawn from the allegations must be construed in the light most favorable to the nonmoving party. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. The court should freely give leave to amend when there is no “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962); see also FED. R. CIV. P. 15(a). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

DISCUSSION

Defendants have filed a motion to dismiss all nine causes of action against them for failure to state a claim. (Mot. to Dismiss (#5)). As Plaintiff has failed to state a claim on all of his causes of action, Defendants’ motions to dismiss and expunge lis pendens are granted.

1 In Plaintiff's first cause of action for debt collection violations under NRS § 649.370,
2 Plaintiff has failed to state a claim because Defendants are not debt collectors as required by
3 the statute. NRS § 649.370 states that a violation of the federal Fair Debt Collection Practices
4 Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq., along with all regulations adopted under this Act
5 is a violation of Nevada law. For a defendant to be liable for a violation of the FDCPA, the
6 defendant must be classified as a "debt collector" within the meaning of the Act. *Heintz v.*
7 *Jenkins*, 514 U.S. 291, 294 (1995); *McCurdy v. Wells Fargo Bank, N.A.*, 2010 WL 4102943,
8 at *3 (D. Nev. 2010). A "debt collector" is defined by the FDCPA as a person "who regularly
9 collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed
10 or due another." 15 U.S.C. § 1692a(6). Foreclosure pursuant to a deed of trust does not
11 constitute debt collection under the FDCPA. *Camacho-Villa v. Great W. Home Loans*, 2011
12 WL 1103681, at *4 (D. Nev. 2011). Additionally, "the FDCPA's definition of 'debt collector'
13 does not 'include the consumer's creditors, a mortgage servicing company, or any assignee
14 of the debt, so long as the debt was not in default at the time it was assigned.' " *Id.* (quoting
15 *Croce v. Trinity Mortg. Assurance Corp.*, 2009 WL 3172119, at *2 (D. Nev. 2009)). As
16 Defendants here are foreclosing on the Property pursuant to a deed of trust, they do not
17 qualify as "debt collectors" within the meaning of the FDCPA, and consequently neither the
18 FDCPA nor NRS § 649.370 apply.

19 Plaintiff's second cause of action alleging unfair and deceptive trade practices in
20 violation of NRS § 598.0923 has also failed to state a claim for relief. Under the statute, a
21 person engages in a deceptive trade practice when he or she knowingly conducts business
22 without all required state, county or city licenses. NEV. REV. STAT. § 598.0923(1). The statute
23 however explicitly states that the following activities do not constitute doing business in the
24 State of Nevada: (1) maintaining, defending or settling any proceeding; (2) creating or
25 acquiring indebtedness, mortgages, and security interests in real or personal property; and (3)
26 securing or collecting debts or enforcing mortgages and security interests in property securing
27 the debts. NEV. REV. STAT. 80.015(1)(a), (g)-(h). Because Defendants in this mortgage case
28 are not considered to have been doing business in Nevada, NRS § 598.0923 does not apply

1 and this cause of action is dismissed without leave to amend.

2 The Court also dismisses Plaintiff's third cause of action for unfair lending practices
3 under NRS § 598D.100 because the statute of limitations has run on this claim. Plaintiff
4 alleges Defendants engaged in unfair lending practices by luring Plaintiff into obtaining the
5 loans based solely on the future equity of the home in violation of § 598D.110. (Compl. (#1-1)
6 at 31). An action "upon a statute for a penalty or forfeiture" has a two-year statute of
7 limitations, unless the statute provides otherwise. NEV. REV. STAT. § 11.190(4)(b). The plain
8 language of the statute indicates that it is a statute for a penalty and does not contain its own
9 limitations period, and consequently the statute of limitations period on this claim is two years.
10 See NEV. REV. STAT. § 598D.110. As the loan was extended in 2005 and Plaintiff did not file
11 his complaint until 2011, the statute of limitations has run on this claim.

12 Plaintiff has additionally failed to state a claim in his fourth cause of action for violation
13 of the covenant of good faith and fair dealing. Nevada law holds that "[e]very contract imposes
14 upon each party a duty of good faith and fair dealing in its performance and its enforcement."
15 *A.C. Shaw Constr. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting RESTATEMENT
16 (SECOND) OF CONTRACTS § 205). To succeed on a cause of action for breach of the covenant
17 of good faith and fair dealing, a plaintiff must show: (1) the plaintiff and defendant were parties
18 to an agreement; (2) the defendant owed a duty of good faith to the plaintiff; (3) the defendant
19 breached that duty by performing in a manner that was unfaithful to the purpose of the
20 contract; and (4) the plaintiff's justified expectations were denied. *Perry v. Jordan*, 900 P.2d
21 335, 338 (Nev. 1995).

22 Defendants first allegedly violated the covenant of good faith and fair dealing by luring
23 Plaintiff into the initial loans by wrongfully declaring he qualified for those loans. (Compl. (#1-
24 1) at 32). Yet to be actionable, the breach of the covenant must have occurred *after* the
25 formation of the contract, not *before*. *Crow v. Home Loan Ctr., Inc.*, 2011 WL 3585466, at *3
26 (D. Nev. 2011). Plaintiff also contends Defendants violated the covenant of good faith and fair
27 dealing by offering Plaintiff consideration for loan modifications, falsely telling him the
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1 foreclosures would be postponed. (Compl. (#1-1) at 33). Yet Plaintiff has provided no
2 information that confirms the existence of a loan modification agreement or contract between
3 the parties. See *Perry*, 900 P.2d at 338 (requiring the plaintiff to show the existence of a
4 contract to state a claim for breach of the covenant of good faith and fair dealing). Finally,
5 Plaintiff argues Defendants violated the covenant of good faith and fair dealing by frustrating
6 the legitimate purposes of the mortgage contract. (Compl. (#1-1) at 34). Foreclosing upon
7 a loan where such foreclosure is permissible by law and the loan agreement does not deprive
8 Plaintiff of any justifiable expectations as he consented to the arrangement.

9 Plaintiff has similarly failed to state a claim under his fifth cause of action for violations
10 of NRS § 107.080 because the foreclosure was proper. BAC and ReconTrust had both been
11 properly substituted as the beneficiary and trustee respectively. (Assignment (#5-6);
12 Substitution of Trustee (#5-7)). Because Defendants had been properly substituted and
13 Plaintiff was in default, the foreclosure proceedings were not improper. See *Gomez v.*
14 *Countrywide Bank, FSB*, 2009 WL 3617650, at *2 (D. Nev. 2009) (finding that as long as the
15 note is in default and the foreclosing trustee is either the original trustee or has been
16 substituted by the holder of the note or the holder's nominee, there is no defect in the Nevada
17 foreclosure).

18 The sixth cause of action for quiet title also fails because Plaintiff is in default and has
19 not alleged he has paid the debt owed. A quiet title action may be brought by a party who
20 claims an adverse interest in the subject property. NEV. REV. STAT. § 40.010. Quiet title
21 actions are equitable in nature and it is generally required that a party that seeks equity must
22 do equity. *Transaero Land & Dev. Co. v. Land Title of Nevada, Inc.*, 842 P.2d 716, 718 (Nev.
23 1992). For the plaintiff to do equity, it is generally required that the plaintiff tender the
24 undisputed amount due on the note in order to challenge the validity of the foreclosure sale.
25 *Davila v. BAC Home Loans Servicing, LP*, 2011 WL 3159146, at *2 (D. Nev. 2011). Quieting
26 title to the Property would be inequitable here as Plaintiff has failed to prove any of his other
27 claims in the complaint. Plaintiff has also defaulted on the loan and has failed to allege he has
28 tendered or is willing to tender the amount owed on the debt.

1 Plaintiff's seventh cause of action for fraud in the inducement and through omission fails
2 because Plaintiff has not alleged any fraudulent statements or omissions concerning the terms
3 of the loan and because Plaintiff has failed to satisfy the strict pleading requirements of Fed.
4 R. Civ. P. 9(b). Under Nevada law, a claim of fraud requires the plaintiff to establish each of
5 the following elements: (1) a false representation; (2) knowledge or belief that the
6 representation was false (or knowledge that the defendant's basis for making the
7 representation was insufficient); (3) intent to induce the plaintiff to consent to the contract's
8 formation; (4) justifiable reliance upon the misrepresentation; and (5) damage resulting from
9 such reliance. *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018
10 (Nev. 2004). Pursuant to Rule 9(b), a party alleging fraud "must state with particularity the
11 circumstances constituting fraud or mistake." To satisfy this standard, a plaintiff must plead
12 "an account of the 'time, place, and specific content of the false representations as well as the
13 identities of the parties to the misrepresentations.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764
14 (9th Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)).

15 Plaintiff here has failed to allege any false statements or omissions that were material
16 to the terms of the loan. Plaintiff only alleges that he was not made aware of the inner
17 workings of the mortgage industry, which ultimately had no effect upon the loan agreement.
18 As Plaintiff has not alleged any false statements or omissions concerning the terms of the
19 loan, he has failed to state a claim for fraud. Additionally, Plaintiff's fraud allegations lack the
20 specificity required by Rule 9(b) because Plaintiff has failed to allege which Defendant
21 committed what alleged fraud, and when and where these fraudulent actions took place.
22 Therefore, the Court will dismiss Plaintiff's seventh cause of action without leave to amend.

23 The eighth cause of action for slander of title fails because the statements made by
24 Defendants were not untrue. Plaintiff alleges that Defendants slandered his title by recording
25 the notice of default knowing that they were unauthorized to foreclose and knowing the filed
26 document was defective. (Compl. (#1-1) at 52-54). To succeed on a slander of title claim, the
27 plaintiff must show "false and malicious communications, disparaging to one's title in land, and
28 causing special damage." *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 478 (Nev.

1 1998) (quoting *Higgins v. Higgins*, 744 P.2d 530, 531 (Nev. 1987)). Plaintiff here does not
2 deny he has defaulted under the note, and consequently the notice of default is not a false
3 statement disparaging the title to the Property.

4 Plaintiff has also failed to state a claim on his ninth and final cause of action for abuse
5 of process because Plaintiff has failed to allege any facts demonstrating that Defendants had
6 an ulterior purpose in foreclosing and because nonjudicial foreclosure is not considered
7 "process" for the purposes of this tort. To prevail on a claim of abuse of process, the plaintiff
8 must show that the defendant (1) had an ulterior purpose in bringing legal action other than
9 resolving a legal dispute, and (2) used the legal process in a manner that is not proper in the
10 regular conduct of the proceeding. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 478
11 (Nev. 1998). Yet Plaintiff has pled no facts that would show Defendants had any ulterior
12 motive in bringing the foreclosure action. The record shows that Defendants were legally
13 authorized to foreclose and did so. Additionally, nonjudicial foreclosure is not the type of
14 "process" the tort of abuse of process was meant to address because by its very definition it
15 does not involve judicial action. See *Barlow v. BNC Mortg., Inc.*, 2011 WL 3841223, at *4 (D.
16 Nev. 2011). Accordingly, Plaintiff's ninth cause of action lacks merit and is hereby dismissed
17 without leave to amend.

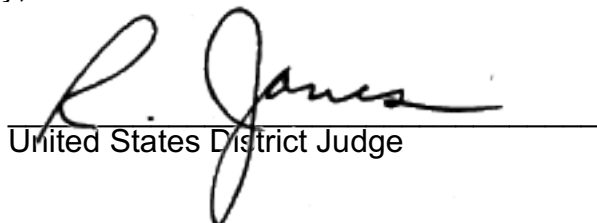
18 CONCLUSION

19 For the foregoing reasons, IT IS ORDERED that Defendants' motions to dismiss (#5)
20 and expunge lis pendens (#6) are granted.

21 IT IS FURTHER ORDERED that the Court *sua sponte* dismisses the remaining
22 defendants from this case without leave to amend.

23 The Clerk of the Court shall enter judgment accordingly.

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25 DATED: This 23rd day of February, 2012.

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27 
28 United States District Judge